Determining the moment when enrichment liability is quantified: the curious case of *Paschke v Frans**

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1 *Introduction*

A well-established principle of South African law, and indeed many other jurisdictions, governs the measure or *quantum* of claims based on unjustified enrichment. The principle is that we do not enquire into what the defendant obtained at the moment of the initial enriching event, but that we rather focus on whatever remains in the defendant's estate. Or, to put it differently, the measure of an enrichment claim is not the value received, but the value remaining. But if the measure of enrichment is that of value remaining, at what moment is this value to be determined? This question was central to the recent decision of the supreme court of Namibia in *Paschke v Frans*.[1]

The established position in South African enrichment law is that the extent of enrichment remaining in the defendant's estate is determined at the date of the commencement of the action. This is defined as the moment summons is issued or served.[2] However, the judgment of O'Regan AJA in *Paschke v Frans* adopts a new approach, which is fundamentally at variance with this established position, even though Namibian enrichment law generally follows the South African model. It will be argued here that this judgement is problematic, inasmuch as it does not take into account relevant case law and also cannot be supported in principle. But before doing so, let us first consider the background to the case more closely.

2 *The background to* Paschke v Frans*: ensuring an illegitimate child is awarded his legitimate inheritance*

On 30 May 1991 Mr Jürgen Eichhorn died intestate in Windhoek. His entire estate, of which the principal assets were two farms, was awarded to his surviving sister, Inge Paschke (the appellant). The final distribution to Paschke took place on 14 April 1994. Thus far the events are unremarkable. But Mr Eichhorn had another relative, a son named Lotta Frans (the respondent). Because Frans was illegitimate, he was not regarded as eligible to inherit under a rule of the common law of intestate succession, which determined that illegitimate children could not inherit intestate from their fathers.

* See also 2016 *TSAR* 312-331 [ed].

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1 (SA 30/2012) 2015 NASC 9 (30 April 2015).

2 See *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 SA 482 (SCA) read with *First National Bank of Southern Africa Ltd v Perry NO* 2001 3 SA 960 (SCA) (discussed at 4.1 below); Du Plessis *The South African Law of Unjustified Enrichment* (2012) 378-379.

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According to Frans, the rule that excluded him from inheriting was unconstitutional, and he was consequently also eligible to share in his deceased father's estate. On 13 July 2005,[3] Frans issued a summons, containing two claims, against his aunt Paschke.[4] The one claim was based on Paschke's unjustified enrichment. As later amended, its quantum was 50% of the value of Eichhorn's estate, alternatively transfer of 50% of the property awarded to Paschke. The second claim was brought under article 25 of the Constitution of the Republic of Namibia, which deals with the enforcement of fundamental rights and freedoms. By agreement between the parties, the issue of the constitutionality of the common-law rule prohibiting illegitimate children from inheriting intestate from their fathers was heard as a separate issue under rule 33(4) of the rules of the Namibian high court. On 11 July 2007, Heathcote AJ in the high court issued a declaratory order in favour of Frans, stating that the common law rule was indeed unenforceable as from the date of the commencement of the constitution, which was 21 March 1990, *ie* shortly before Eichhorn died.[5]

Having established that he was entitled to inherit intestate from his late father, Frans could now proceed with the enrichment claim against Paschke, on the basis that more was distributed to her from the estate than what she was entitled to. For reasons which are not entirely apparent, Frans again deemed it necessary to have a specific aspect of the enrichment claim decided in advance. On 14 June 2012 (almost five years after the first judgment) he approached the high court with a stated case, requesting the court to determine "whether the amount or value by which the first defendant [Paschke] is alleged to be enriched is to be determined as at the date of issue of summons or as at the date of judgment".[6] Paschke maintained the value should have been determined at the date of summons (13 July 2005), whereas Frans regarded the date of judgment (a date which had not yet been reached) as decisive. In the high court Damaseb JP then held that the value of Paschke's enrichment had to be determined:

> "as at the date the court (having received the plaintiff's evidence on the issue) reserves judgment to determine (i) either whether or not the claim for unjust enrichment has been proved, or, if that liability is admitted and the only question in issue is the estate's value, (ii) which party's value must prevail".

So the answer to the question when the defendant's enrichment must be quantified was neither the date the summons was issued, nor the date the judgment was handed down. It was the date when judgment was reserved, which is somewhere in between these dates (though probably closer to the latter than the former).

Paschke appealed against this high court decision in the supreme court of Namibia, where O'Regan AJA (on behalf of the full court) in turn held that the value of Paschke's enrichment had to be determined as at the date of *litis contestatio*, which she defined as "the stage … in the litigation process when the pleadings are

[3] There is some uncertainty as to the exact date of the summons. The date of 13-07-2005 above is taken from the stated case and judgment in *Frans v Paschke* (1548/2005) 2012 2 NAHC 159 (25 June 2012) par 1 and 4. The judgment of O'Regan AJA mentions the date of 11-07-2007 as the date of the issue of summons (see par 4), but the date of judgment happened to have been 11-07-2007, so it may be that there was confusion between the two dates. It is not apparent, though, why O'Regan AJA also states at par 3 that summons was issued in April 2005.

[4] This happened more than 10 years after the distribution; the claim presumably had not prescribed (perhaps because the running of prescription was delayed due to minority?).

[5] *Frans v Paschke* 2009 1 SA 527 (Nm).

[6] *Frans v Paschke* 2012 2 NR 560 (HC) par 1.

closed, and 'when the issue is crystalised and joined'".[7] So again, the operative moment for quantifying an enrichment claim was neither the earlier moment of the issuing of the summons, nor the later moment of judgment. This time the operative moment was the close of pleadings, *ie* somewhere between issuing summons and judgment being reserved.

3 *The preliminary issue: the subject matter of enrichment claim*

The preliminary issue is whether the subject matter of an enrichment claim is the thing itself or its value (or: was it ever really necessary for Frans to bring the stated case if he could claim transfer of a share of the farms, whatever their value may be)?

Before we proceed any further with investigating O'Regan AJA's finding on when Paschke's enrichment should be quantified, it has to be enquired why Frans regarded it as at all necessary to bring a stated case to answer this question.

This enquiry has to do with the subject matter of enrichment claims, *ie* what the plaintiff can claim from the defendant. Where a defendant is enriched by obtaining property, South African enrichment law traditionally maintains that the defendant must give up or surrender the property itself. The plaintiff who lost the property cannot be forced to accept a monetary equivalent of its value.[8] This principle was recognised early in the civilian tradition. Thus, Schulz states that in Roman law the position was that "if [a] *certa res* [*ie* a specific thing] was given, the recipient was bound to restore *the very thing*".[9] And in Roman-Dutch law, Voet makes the general observation that where property has been transferred without being owed, it shall be returned, together with its accruals and fruits.[10] Among modern authors, we find Wessels stating that "the object of the *condictio indebiti* is to recover back *the very thing* which was paid in error or its equivalent if the thing itself cannot be recovered".[11] South African courts have also endorsed this principle. For example, in *Wilken v Kohler*[12] Innes J held that parties to an invalid sale of land had to return whatever assets they received.[13] And in *Pucjlowski v Johnston's Executors,*[14] Van den Heever J, referring to earlier civil-law authorities, held that when relying on a *condictio*, "[i]n general the object is the recovery *of the property itself*, together with its natural fruits".[15] "It is only in exceptional circumstances that economic value may be recovered by condiction in lieu of the recovery of the asset."[16]

7 par 18.

8 See O'Brien "Claiming the return of property with an enrichment remedy and determining the monetary value of property transferred when quantifying an enrichment claim" 2009 *TSAR* 744. This view is applicable to all of the *condictiones* (Lotz "Enrichment" IX *LAWSA* re (updated by Brand) par 210). For a comparative perspective see Von Bar and Clive (eds) IV *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (*DCFR*) (2009) 3849-3850 4103-4119.

9 Schulz *Classical Roman Law* (1951) 615 (own emphasis); see Pomponius' text *D* 12 6 7 ("when debts not due are discharged in error, recovery is either of what is actually given or its value in money"). But see Zimmermann *The Law of Obligations* (1990) 897, indicating that only the value could be claimed (and limiting *D* 12 6 7 to claims for coins).

10 *Commentarius ad Pandectas* 12 6 12 (Gane translation vol 2, 846), referring to *D* 12 6 15.

11 II *The Law of Contract in South Africa* (1937) par 3701 on 1039 – own emphasis.

12 1913 AD 135.

13 145.

14 1946 WLD 1. The court referred to *D* 24 1 6; *D* 12 5 6; *D* 12 7 1 3 and *D* 12 6 66.

15 6 – own emphasis.

16 6.

More recently, in *Fidelity Supercare Services Group (Pty) Ltd v Johannesburg Metropolitan Police Department*,[17] Baqwa J held that "[i]n an enrichment action, the primary claim is a claim for the retransfer of the property if that is possible".[18]

In the light of this line of authority, it may indeed be questioned why Frans was so concerned about the potential dates for determining the value of an enrichment claim. The authorities above clearly indicate that Frans is entitled to transfer of the actual property retained without legal ground at his expense, and that he cannot be compelled to accept a monetary substitute, representing its value (irrespective of when such a value may be determined). Frans may therefore claim transfer of 50% of the assets in the estate, which were transferred to Paschke without legal ground. This means that he is entitled to become co-owner of 50% of the farms, whatever their value. Thus, any increase in the value of the farms would be for his benefit, just as any decrease in the value would have been to his detriment. Frans need not be satisfied with a monetary amount equal to 50% of the value of the estate.

The notion that the enriched in principle has to return what was obtained without legal ground, and not its value determined at some stage after receipt, is rooted in sound principle. The plaintiff is getting what he should have had all along; and if he had it all along, he would have enjoyed the benefit in an increase in value, and would have to bear the consequences of a decrease in value. The recipient also cannot gain or lose under such an approach: he only has to give back what he obtained. The only qualification that our law adds is that we must protect the recipient where he in good faith lost the thing itself, without receiving any value – for example if it is damaged, destroyed, or disposed of gratuitously. The defendant is then entitled to raise the defence of loss of enrichment.[19] This defence was not applicable in the present matter (the assets obtained by Paschke remained the same, as far as we are aware). Nonetheless, for reasons which will become apparent later, the underlying principle is relevant in evaluating O'Regan AJA's views on the date for quantifying an enrichment claim.

Given the authority referred to above in favour of requiring the defendant to give up "the thing itself", why was Frans so concerned about not being entitled to the transfer of half of the actual property forming part of his late father's estate that he brought a stated case requiring courts to rule on how its value is to be determined? The reason, as is apparent from the judgment of Damaseb JP,[20] was Frans's concern that the decision of the South African supreme court of appeal in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*[21] drew a line through these centuries of precedent, in favour of the notion that the plaintiff was no longer entitled to the return of the thing itself and that he had to be satisfied with a monetary amount.

This concern may well have been unfounded. As Damaseb JP held, the decision in the *Kudu* case was handed down after Namibia's independence, and was therefore not binding: "[t]he common law position in Namibia is therefore the pre-*Kudu Granite* one."[22] However, even though it was therefore unnecessary for Damaseb JP to express a view on the correctness of the *Kudu* case, it may be added that it is in any event doubtful whether the supreme court of appeal in that case really intended to overturn the established position. In the *Kudu* case the parties to a contract of

[17] (7209/2009) 2013 ZAGPPHC 6 (16 Jan 2013).
[18] par 35; also see par 21.
[19] See *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 3 SA 699 (A).
[20] *Frans v Paschke* 2012 2 NR 560 (HC) par 5.
[21] 2003 5 SA 193 (SCA).
[22] par 5; also see par 6.

sale of shares agreed that marble blocks had to be delivered in lieu of payment of the purchase price. It was held that the transferor was only entitled to restitution of the purchase price and not to restitution of the blocks. These blocks were merely regarded as the "coinage" whereby the obligation to pay the price could be discharged.[23] The decision is problematic inasmuch as it allowed the terms of the void contract to influence the measure of an enrichment claim;[24] such an approach to quantification is rather characteristic of a contractual claim for restitution.[25] But more importantly, it is quite apparent that the supreme court of appeal never expressly overruled the general principle that the primary aim of enrichment liability is to ensure restitution of the transfer itself. The court may simply have misapplied the principle to the facts,[26] by ordering restitution of the purchase price, and not the blocks.

4 *The main issue: moment for quantification*

The main issue is when the enrichment claim is to be quantified (or what is the operative moment for valuing the assets which are held by Paschke, but should have been distributed to Frans)?

A second reason why Frans may have regarded it as necessary to bring the stated case on when enrichment claims should be quantified is that, apparently, the relevant principles of quantification of enrichment claims were regarded as so uncertain that it was regarded as best to have this determined at the outset, to enable proper valuations to be made with reference to the correct date.[27] Whether this really justified bringing a stated case to the high court is questionable,[28] but be that as it may. Before we examine the judgments by Damaseb JP in the high court and O'Regan AJA in the supreme court in more detail, let us first consider these basic principles.

[23] (n 21) par 18.

[24] See Eiselen "Quantifying unjustified enrichment claims" 2004 *THRHR* 524 527; Visser *Unjustified Enrichment* (2008) 162-163 265 290 and Sonnekus *Unjustified Enrichment in South African Law* (2008) 53. The notion that something of the contract still remains, is reflected in the reference in the *Kudu* case to the contractual provisions being "largely" irrelevant (n 21) par 15. As Eiselen pointed out, the terms are *entirely* irrelevant (525).

[25] See Du Plessis (n 2) 86-93 on the contractual claims for restitution that arise pursuant to cancellation due to breach.

[26] See O'Brien (n 8) 746 and Eiselen and Pienaar *Unjustified Enrichment — A Casebook* (2008) 31. It is not clear why O'Brien maintains that the plaintiff can only require restitution of property *of which it has lost ownership* (756-757). Assume A sells C a painting which belongs to A's debtor B. A tells B that in fulfilment of his debt to A, B must transfer the painting to C. B does so, but it transpires that the agreement of sale between A and C is void. A's performance to C therefore was made without legal ground. A (not B) should now be able to reclaim the painting, even though A never owned the painting, and hence never lost ownership of it. The same principle applies in *Frans v Paschke*: Frans should be able to claim his share of the assets in the estate, even though he never owned the assets.

[27] See the *Paschke* case (n 1) par 11.

[28] the *Paschke* case (n 1) par 12.

4.1 Schutz JA in the *Perry* and *McCarthy* cases: the operative date for determining enrichment is the time of the institution of action, *ie* the date of summons

We can begin with judicial pronouncements of the issue. In *First National Bank of Southern Africa Ltd v Perry NO*,[29] Schutz JA held that "ordinarily the existence of enrichment is judged *at the time of institution of action* …".[30]

Schutz JA did not state in the *Perry* case when exactly an action is instituted, but in *McCarthy Retail Ltd v Shortdistance Carriers CC*,[31] which was decided a few days earlier, he held that the existence and extent of enrichment is usually taken at the date of the summons.[32] If one wants to be very specific, it can be said that the "date of summons" could mean either the moment the summons is issued or the moment it is served.[33] But if issuing of a summons is immediately followed by service of summons, it would not matter from a practical perspective which of these moments is chosen, and it would more specifically not have mattered in *Frans v Paschke*.

What would the justification be for measuring enrichment at the "date of summons"? The answer may be found in the defence of loss of enrichment. In South African law (and Namibian law), enrichment claims are "weak", in the sense that the defendant is liable only for the value remaining with him, and not for the full value he received.[34] An important policy motivation behind allowing a "weak" claim is that it is regarded as equitable to protect a recipient who innocently believes that he is free to dispose of the enrichment as he wishes.[35] The underlying argument is essentially that a defendant who relies on being entitled to keep the enrichment should be absolved from returning that which can no longer be returned.[36] Conversely, once the defendant becomes aware that he has been enriched without legal ground at the plaintiff's expense, his liability may not be reduced or extinguished any further,

[29] (n 2).

[30] par 29. As authority Schutz JA referred to IX *LAWSA* first reissue par 76. That *LAWSA* passage states that "in an enrichment action the defendant's liability is confined to the amount of his actual enrichment at the time of the action". The most recent edition of *LAWSA* refers to the actual enrichment "at the time of the *commencement* of the action" ((n 8) par 209 – own emphasis). Authorities that also refer to "commencement of action" include *Watson NO v Shaw NO* 2008 1 SA 350 (C) par 58 and *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever NO* (199/2012) 2012 ZASCA 195 (30 Nov 2012) par 34. It appears that the terms "institution of action" and "commencement of action" are used interchangeably.

[31] (n 2).

[32] (n 2) par 18.

[33] In determining when an action commences, some cases regard the moment the summons is issued as conclusive (see *Jan van Heerden & Seuns BK v Senwes Bpk* 2006 1 All SA 44 (NC) par 47.4; *Marine and Trade Insurance Co Ltd v Reddinger* 1966 2 SA 407 (A) 413 and *Glen v Glen* 1971 3 SA 238 (R) 240-241), while others favour the moment when summons is served (see *Mills v Starwell Finance (Pty) Ltd* 1981 3 SA 84 (N) 89-90).

[34] The "weak claim" approach was not a general feature of Roman or Roman-Dutch law. Some Roman sources indicate that the defendant was liable only for what remained at *litis contestatio* (see *D* 24 1 7; *D* 46 3 47), but other sources have been interpreted in favour of liability for the full value received (on *D* 12 6 26 12 see Flume "Der Wegfall der Bereicherung in der Entwicklung vom römischen zum geltenden Recht" in *Festschrift für Niedermeyer* (1953) 103). South African law adopted the "weak claim" approach under influence of nineteenth-century German law (see Visser "Unjustified enrichment" in Zimmermann and Visser (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996) 526-528).

[35] See *King v Cohen Benjamin & Co* 1953 4 SA 641 (W) 650. Also see Sonnekus (n 24) 14 on the argument that the plaintiff may have been responsible for the enrichment leaving his estate.

[36] See Visser (n 24) 737. Also see Birks *Unjust Enrichment* (2005) 209 for a comparable argument in English law.

unless the loss was not his fault.[37] The defendant's liability is now "fixed"; any further loss is for his account.

But what does recognition of the defence of loss of enrichment have to do with measuring enrichment at the date of the summons? The answer is that the date of summons is the last date we can be quite sure that the defendant would no longer be able to rely on the defence of loss of enrichment. From that date onwards, and more specifically when summons is served, the defendant must know that his right to retain the enrichment is being challenged, and that he may have to surrender it. This is also why Schutz JA added the word "ordinarily" in the quote above: the date of summons is "ordinarily" conclusive, but if the defendant became aware earlier on that he was enriched without legal ground (*eg* if served with an earlier notice or letter of demand), the measure of liability is determined with reference to that earlier date.[38]

It is sometimes said, generally in academic writings, that the measure of enrichment liability is determined at *litis contestatio*.[39] But what could this mean? One possibility is that *litis contestatio* is merely used synonymously with "the commencement of the action" or "the institution of the action", defined as the date of summons. Such an interpretation of *litis contestastio* would then conform to the approach of our courts set out above. However, sometimes (outside the context of enrichment law) *litis contestatio* is defined differently, as the moment when pleadings are closed and a matter is ready to be heard.[40] Such an interpretation would of course be fundamentally different from the approach followed by Schutz JA in South African law: the moment pleadings are closed cannot be the same as the moment when summons has been issued or served. But more about this meaning later. Let us turn to the two main judgments.

4.2 Damaseb JP: the operative moment for determining enrichment is when judgment is reserved

In the light of the authorities above it can be concluded that Paschke was correct: under South African (and Namibian) law, enrichment has to be quantified with reference to the date of the summons. Ultimately, this is of course irrelevant on the facts: as we have seen, Frans was in any event entitled to claim a share in the property, and not (merely) its value.[41] However, since Damaseb JP was called upon

[37] the *Perry* case (n 2) par 29; the *Glenrand* case (n 30) par 34.

[38] par 29. It is worth quoting the full statement: "Whereas ordinarily the existence of enrichment is judged at the time of institution of action, if the defendant becomes aware that he has been enriched *sine causa* at the expense of another, his liability is reduced or extinguished only if he is able to prove that the diminution or loss of his enrichment was not due to his fault: *The Law of South Africa* vol 9 first reissue par 76. This rule that the enriched party may not with impunity part with the goods after learning of the impoverished party's claim supports the conclusion reached earlier that once he gains such knowledge he is liable to the extent of his enrichment, that he thereafter, so to speak, holds for the benefit of the original owner."

[39] See Visser (n 24) 163; Visser "Unjustified enrichment" in Du Bois (ed) *Wille's Principles of South African Law* (2007) 1048-1049; Eiselen and Pienaar (n 26) 13-15 27-28 54-57; Sonnekus "Wegval of vermindering van verryking as verweer" 2006 *Stell LR* 454 458 and De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (1987) 32. On the meaning of this concept in Roman law, see generally *Jankowiak v Parity Insurance Co Ltd* 1963 2 SA 286 (W) 288.

[40] See *Government of the Republic of South Africa v Ngubane* 1972 2 SA 601 (A) 608D; *Milne NO v Shield Insurance Co Ltd* 1969 3 SA 352 (A) 358C-E; the *Jankowiak* case (n 39) 289. Uniform Rule 29 determines when pleadings are closed (see *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T) 20).

[41] See par 3 above.

to resolve the issue of the operative date for determining the measure of enrichment liability, this is what he proceeded to do.

At first Damaseb JP indicated that counsel for Paschke argued that the operative date must be the date of summons, since "it is that date on which Paschke had notice of Frans's claim". This logic ties in neatly with the principles set out above: the enriched's knowledge of the claim is relevant because it indicates that he must now be on his guard, since he may have to give up what he had obtained without legal ground.

But it is at this juncture that the case took a rather curious turn. Damaseb JP then proceeded to state that counsel for Paschke "therefore locates his argument on the generally accepted position in contract that a defendant must be in *mora* as a precursor to a claim for damages for a breach of contract".[42] It is not apparent how this statement follows from what had been said beforehand. It is indeed the case that where no date for performance of a contract is determined, the creditor may by way of a notice indicate a reasonable period for performance. The purpose of such a notice is to obtain certainty about when performance is to take place, nothing more. If there is no performance, the creditor may rely on a variety of remedies. These include specific performance or (in exceptional cases) cancellation, and in any event damages. But such a notice of demand is not necessary to claim damages; if a date for performance was set in the contract, then a claim for damages would also be available. All in all, no logical link exists between the notice of an enrichment claim aimed at restitution of an undue transfer, and the notice which establishes a date for performance of a contract, and hence possible breach from which a claim for contractual damages could flow.

Thereafter, Damaseb JP proceeded to consider certain principles related to claiming contractual and delictual damages. He then pointed to some situations (*eg* claims for loss of income) where delictual damages are not determined with reference to the date the delict is committed, but some later date. He then concluded:

> "10 These special categories in delictual claims approximate the situation facing the Court in the present case. The common denominator being, in my view, the recognition that confining compensation to the date of the damage-causing event does not achieve the object of compensation to the fullest extent possible.
>
> 11 In my view, the matter is best approached having regard to the underlying principles for the award of damages. The primary object of an award of damages is 'the fullest possible compensation of the plaintiff's damages'. The authors Visser *et al* go on to suggest that for that reason, 'the relevant time for assessment should be the latest stage in the lawsuit when new evidence may be submitted'. This implies that the damages may be assessed at the time when the court commences with its judgement. …
>
> 13 In an unjustified enrichment situation, the damage to the plaintiff is not completed until the object of unjust enrichment is restored to him. His damages continue to run for as long as the defendant remains benefitting from his retention or possession of that which properly belongs to the plaintiff.
>
> 15 In the present case, to determine the value of the enrichment as at the date of summons would not achieve the object of damages which is to recompense the plaintiff to the 'fullest possible extent of his damage' and will have the result that the first defendant benefits from her unjustified enrichment to the plaintiff's detriment."[43]

[42] par 7; the statement is footnoted: "5. See generally, Christie, *The Law of Contract*, 5th edn, page 495-505."

[43] par 10-15.

Ultimately, Damaseb JP reached the conclusion that enrichment is to be determined at the date on which the court, after having heard evidence as to that value, reserves judgment.[44] It is said not to be the date of judgment itself, because it would lead to uncertainty, given that the value of the enrichment may have changed between the date the judgment is reserved and the date of judgment.[45] In essence, Damaseb JP's argument is that enrichment claims are sufficiently analogous to delictual claims for damages to warrant determining their measure at the date judgment is reserved.[46]

However, this argument is problematic for at least two reasons. First, the court never engaged with the case law, mentioned in the previous section, which maintains that enrichment liability is quantified at the time of the commencement of action. More specifically, no consideration was given to the justification (referred to above) for preferring this date, namely that it is essential to ensure that the defendant would from now onwards have a duty to take care of what it had obtained without legal ground. One must add, though, that care must be exercised in faulting courts for not citing authority; as the supreme court also pointed out,[47] the reason (usually) is that none was cited to it.

Secondly, any analogy between the principles aimed at quantifying claims based on unjustified enrichment and claims for delictual damages is problematic, given that they have diametrically opposed aims. Claims for delictual damages (like claims for contractual damages) ultimately are aimed at balancing out losses; the purpose is to place the victim in the position he would have been in had the loss-creating event not occurred. Claims based on unjustified enrichment have the opposite purpose; they aim to ensure that a person surrenders a gain, preferably the actual benefit they had obtained.[48] Nothing in the present matter prevented Paschke from surrendering part of the assets she received; this would have achieved the purpose of balancing out the gain. It was therefore also unnecessary to value these benefits; their value was immaterial to reaching the goal of ensuring that Paschke effects restitution.

4.3 O'Regan AJA: the operative moment for determining enrichment is *litis contestatio*, defined as "the stage in the litigation process when the pleadings are closed"

In the supreme court, O'Regan AJA was not convinced by Damaseb JP's view that an enrichment claim, like a claim in delict, should ensure that the plaintiff receives "the fullest compensation possible".[49] As indicated above, at its heart, the law of unjustified enrichment is aimed at balancing out gains, and not losses. But even if one still believes that the law of unjustified enrichment is *also* about balancing out losses (or impoverishment), it certainly can never be *only* aimed at balancing out losses. As O'Regan AJA pointed out, the measure of an enrichment claim is (always) the lesser of the plaintiff's impoverishment and the defendant's enrichment.[50] And if the defendant's gain is less than the plaintiff's loss or impoverishment, then the focus can only be on the gain. In these circumstances there can be no question of compensating the plaintiff, let alone at "the fullest extent possible".

[44] par 16.
[45] See par 12.
[46] Also see the interpretation of the supreme court par 13.
[47] See the supreme court judgment par 13.
[48] See Zimmermann "Unjustified enrichment: the modern civilian approach" 1995 *Oxford Journal of Legal Studies* 403-429 and Du Plessis (n 2) 1.
[49] par 14 and 19.
[50] par 14.

Having brought us back on track on the function and aim of the law of unjustified enrichment, and how its claims for restitution differ from claims for delictual damages, O'Regan AJA then proceeded to turn to the alternative sources of inspiration. And here we find the case taking another curious turn. After an extensive overview of the views of academic authors, O'Regan AJA concluded that they use a variety of concepts to describe the operative moment. These include *litis contestatio* (Sonnekus);[51] the date of the commencement of the action (*LAWSA*);[52] the date of demand (De Vos);[53] and *litis contestatio* defined as the date of the commencement of the action (Visser[54] as well as Eiselen and Pienaar).[55]

However, if we accept, as O'Regan AJA does, that an action commences on the date of issue of summons,[56] then at least Visser, Eiselen and Pienaar, as well as *LAWSA* (Lotz- Brand) by implication all regard the date of summons as the operative moment. This majority academic view[57] would therefore actually be in line with the case law we dealt with earlier, and more specifically with the judgments of Schutz JA in the *Perry* and *McCarthy* cases.

Unfortunately, neither the high court nor the supreme court seems to have been aware that the view favouring the date of the summons is also supported by these judgments. Facing what is perceived as a lack of authority on the point, O'Regan AJA then proceeded to regard the moment of *litis contestatio* as operative, but interpreted it to mean the stage when the pleadings are closed and "when the issue is crystallised and joined".[58] However, as we have seen, this is not the meaning attached to the term in the context of the enrichment judgments referred to above, or indeed the meaning favoured by the majority of academics.[59] O'Regan AJA did, however, candidly accept that she could not find clear judicial authority for the notion that the moment for determining the *quantum* of an enrichment claim[60] is *litis contestatio*, defined as close of pleadings in Namibia or South Africa. Had she been made aware of the Schutz JA judgments, the matter may therefore have been

[51] Sonnekus (n 24) 13-15 27-28 54-57.

[52] Lotz (n 8) 209.

[53] De Vos (n 39) 201.

[54] Visser (n 24) 163 173; Visser (n 39) 1048-1049.

[55] The court referred to the 1999 edition of Eiselen and Pienaar (n 26) 29.

[56] See par 18, referring to the *Marine* case (n 33) 413D: "Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him. (*Nxumalo v Minister of Justice* 1961 3 SA 663 (W))."

[57] The author has also endorsed an interpretation focussing on the date of summons, with the minor qualification that the moment of service, rather than of issue of the summons, should preferred (Du Plessis (n 2) 378-379). As far as De Vos is concerned, all he really is saying is that *if* the plaintiff demands restitution, the defendant will from then onwards no longer enjoy the defence that he (innocently) lost the enrichment ((n 39) 95 201, which is the page cited by O'Regan AJA, and 336-377). As indicated earlier, this just means that if there happens to be notification at a date prior to the date of summons, then enrichment is quantified with reference to the prior date (see par 4.1 above).

[58] par 18.

[59] See par 4.1 on the judgments of Schutz JA in the *McCarthy* case (n 2) read with the *Perry* case (n 2). These judgments were handed down after Namibian independence in 1992 (see n 22 above), but would undoubtedly have had persuasive force. The definition of *litis contestatio* as the moment pleadings are closed has been favoured in other contexts, e.g. when cession may take place. See n 40 above and the reference in the O'Regan judgment at par 18 to the *Ngubane* case (n 40) 608D-E.

[60] "In my view the appropriate date for the determination of the quantum of *damages* is when the stage of *litis contestatio* is reached …" par 20 – own emphasis. Presumably, O'Regan AJA intended to use the word enrichment rather than damages (see par 25 of the court order, where it is stated that the value of the *enrichment* must be determined as at *litis contestatio* – own emphasis).

decided differently. Nonetheless, O'Regan AJA also regarded her approach as "both practical and principled". In this regard the following motivation is provided:

> "Adopting the approach will have the effect that the question of whether there has been enrichment (and corresponding impoverishment), will be determined once issue has been joined between the parties. At that stage, the defendant will have pleaded and lodged a counterclaim, if any, and the evidence in the trial should be directed at determining whether there was unjustified enrichment (and consequent impoverishment of the plaintiff) at the time pleadings closed. The content of the pleadings lodged by both the plaintiff and defendant will provide direction and content to the evidence to be led in the trial and will enable expert witnesses to prepare reports appropriately. Were the enrichment to be calculated on the basis of the date of issue of summons (or date of demand were that to be earlier), the quantum would be calculated at a time before the defendant has pleaded (and, where appropriate, lodged a counterclaim). Given that in an enrichment claim, the overall purpose is to determine the extent of the defendant's unjustified enrichment, and the plaintiff's consequential impoverishment, the facts pleaded by the defendant in a plea and any counterclaim will be of crucial importance in determining the extent of enrichment. It seems to make good sense, then, that the time when the quantum of enrichment is to be determined is the time when the pleadings close at *litis contestatio*."[61]

A problem with this motivation, though, is it is difficult to reconcile with the practical reality, pointed out earlier,[62] that as of the date of summons, the defendant will always know that another person is laying claim to the enrichment. From then onwards the defendant's liability will always be "fixed", and any later (culpable) loss of enrichment would always be for the defendant's account.[63] Thus, if A mistakenly paid B R100 000 he did not owe B, and B still had the R100 000 at the date of summons, the measure of B's enrichment would be R100 000; the later fate of the money in B's hands until the close of pleadings is irrelevant; it does not matter if he lost any or all of it between the date of summons and close of pleadings. To maintain, as O'Regan AJA does, that the extent of enrichment liability is determined only at the date the pleadings closed suggests that the defendant's enrichment is somehow not fixed till then.

But there is a further consideration counting against only quantifying an enrichment claim at the close of pleadings. At least as far as South African law is concerned, liability for interest on an enrichment claim arises from the date of service of a summons (*ie* the commencement of the action), unless payment had been demanded earlier.[64] The dates for quantifying the main claim and for determining interest on the main claim are therefore synchronised. Again the underlying logic seems to be that from this moment onwards the defendant must bear the consequences of knowing that the enrichment may have to be returned. The defendant should therefore be liable not only for loss of enrichment, but also for interest, since he is depriving the plaintiff of the benefit of the enrichment by continuing to retain it.

We must, however, again point out that the position in Namibian law (and, it is suggested, South African law) is that where the defendant has been enriched by receiving a specific object, the plaintiff may require that the defendant return or surrender that object. When quantifying the extent of enrichment liability, it is

[61] par 21.
[62] See par 4.1 above.
[63] See par 4.1 above.
[64] See s 2A of the Prescribed Rate of Interest Act 55 of 1975, which came into effect on 11-04-1997, and which applies to unliquidated debts, including enrichment claims (see the *Kudu* case (n 21) par 28).

not necessary to value the object. Thus if A transferred a motor car to B without being obliged to do so, and the car was subsequently damaged without B's fault or knowledge that he was not entitled to keep the car, then B may give back the car in its damaged condition. The value of the car – whether at the date it was transferred, or the date of summons, or the date of close of pleadings – is irrelevant. It is only if the defendant became aware of the plaintiff's claim, and thereafter culpably caused damage to or loss of the car, that we will have to determine an amount which the plaintiff has to pay to make good these losses. But that amount would have to be determined with reference to the date the defendant became aware of the claim, and again the latest that could ever be is the date of summons, not the date of close of pleadings.

5 *Conclusion*

Paschke v Frans is indeed a curious case. The high court and supreme court of Namibia should probably not have been called on by way of a stated case to answer an abstract question of law that was of secondary importance on the facts.[65] Frans's (primary) claim against Paschke is that half the assets in his late father's estate, including a half share in the farms, should be transferred to him. The fact that the value of the assets changed over time is immaterial: Frans would still benefit from the increase in the value of the farms, just as he would have had to bear the risk of any decrease.

But the case is also curious for another reason. In deciding a matter of fundamental legal principle, the supreme court did not take into account recent case law, and focussed almost exclusively on academic writings. It must be pointed out, in fairness, that this was not a deliberate decision of the court; its attention was probably never drawn to these recent cases. However, the unfortunate consequence was that a decision was made which resurrected old uncertainties. Whereas the modern cases, which the court did not consider, state that the value of the defendant's enrichment is quantified at the commencement or institution of the action, defined as the date of summons, O'Regan AJA focussed on the notion that the operative moment is *litis contestatio*, defined as the date of close of pleadings. This conclusion not only lacks authority, but is difficult to reconcile with the basic principle that a defendant's liability is essentially fixed once he knows that someone else is laying claim to value in his hands. And this date, at the very latest, would be the date of summons, when the action commences.

SAMEVATTING

BEPALING VAN DIE MOMENT VIR DIE VASSTELLING VAN DIE OMVANG VAN VERRYKINGSAANSPREEKLIKHEID: DIE MERKWAARDIGE UITSPRAAK IN *PASCHKE v FRANS*

In *Paschke v Frans* is bevind dat die omvang van verrykingsaanspreeklikheid bepaal word by *litis contestatio*, wat dan gedefinieer word as die oomblik wanneer die pleitstukke sluit. Dit word aan die hand gedoen dat hierdie benadering problematies is.

Eerstens berus dit nie op enige gesag nie. Namibië volg oor die algemeen die Suid-Afrikaanse gemenereg, en die mees onlangse Suid-Afrikaanse uitsprake stel dit duidelik dat die omvang van verrykingsaanspreeklikheid reeds bepaal word wanneer die eiser sy eis instel, dit wil sê wanneer die dagvaarding uitgereik of beteken word. Dit is nie die oomblik wanneer uitspraak voorbehou word nie (soos die hof *a quo*, met verwysing na beginsels wat van toepassing is by die bereken van deliktuele

[65] See par 6-12 of the supreme court's judgment.

skadevergoeding, dit wou hê nie). En dit is ook nie die oomblik wanneer die pleitstukke sluit nie (soos war O'Regan op appèl met verwysing na gesag beslis het nie).

Tweedens is die benadering in beginsel onaanvaarbaar. Dit is veral onduidelik hoe hierdie benadering versoen kan word met die reël dat 'n verweerder se aanspreeklikheid nie kan verminder nie, ofte wel vasstaan, nadat hy bewus geword het van die eiser se aanspraak op die opgee van die verryking. Die laaste oomblik waarop die verweerder van so 'n aanspraak bewus kan word, is die oomblik van dagvaarding en nie die latere oomblik wanneer die pleitstukke sluit nie.

Wat die saak verder problematies maak, is die feit dat die eiser in die onderhawige saak se verrykingseis eintlik ten doel gehad het om bates te verkry wat hy veronderstel was om te erf, maar wat sonder regsgrond deur die eksekuteur aan die verweerder oorgedra is. Vir doeleindes van hierdie eis was dit onnodig om die bates te waardeer; sy eis was vir die bates self, en nie vir 'n geldbedrag wat hul waarde op die een of ander tydstip verteenwoordig het nie. Om dié rede speel die datum waarop die verrykingsaanspreeklikheid bepaal word eintlik geen rol met betrekking tot die werklike objek van sy vordering nie.

JURISTE MOET PRESIES MET REGSBEGRIPPE OMGAAN ANDERS KAN HULLE HUL NIE VAN HUL VAKWERKGEREEDSKAP BEDIEN NIE

Sonder 'n begrip van die sisteem waarbinne 'n regskonstruksie te pas kom, ontbreek dit volgens Spielbüchler aan die nodige onderbou vir omgang met regskonstruksies. Kerschner het daaraan toegevoeg dat juis die voorafgaande begrip bepalend is vir 'n juiste hantering van die terminologie van die regswetenskap. Om dié rede meen Hoyer moet regsbegrippe presies omlyn en gedefinieer wees en is slordige omgang met regsbegrippe onverskoonbaar in die regswetenskap of –praktyk. Juiste taalgebruik is die belangrikste handwerkgereedskap van die juris en persone met 'n aangebore taalbehindering in 'n meertalige geselskap sukkel om mee te ding met die meer taalbegaafde juriste wat in meerdere tale tuis is.

"'Das System prägt das Vorverständnis', stellt der zu früh verstorbene Karl Spielbüchler 2001 fest, Kerschner setzt fort '…und das Vorverständnis prägt die Begriffe. Und die Begriffe müssen sich bewähren, sonst taugen sie nichts'" Hoyer "Simultanhypothek, nachfolgende Pfandrechte und Meistbotsverteilung" 2014 *Notar Zeitschrift* 365 met verwysing na Spielbüchler "Die Leistungskondiktion im System der kaussalen Übereignung" 2001 *Juristische Blätter* (*JBl*) 28 41 en Kerschner "Zum Leistungsbegriff im östereichischen Bereicherungsrecht" 2013 *JBl* 409 411.